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BEFORE THE
**FEDERAL COMMUNICATIONS COMMISSION**
WASHINGTON, DC 20554



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| In the Matter of | ) | CC Docket No. 95-116 |
| | ) | RM 8535 |
| Telephone Number Portability | ) | DA 96-358 |
| | ) | |



# REPLY COMMENTS OF COX ENTERPRISES, INC.

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## SUMMARY

The comments in this proceeding demonstrate that the 1996 Act reinforced the Commission's power to adopt number portability requirements. The Commission should use that power to require implementation of number portability now and to assure that the costs of number portability are recovered on a competitively neutral basis.

The Commission has an obligation to require implementation of number portability now because portability is technically feasible. The Supreme Court has made it clear that a feasibility analysis requires an agency to consider only if something can be done, and there is no question that there is a number portability technology — Location Routing Number — that fits the statutory definition of number portability and is technically feasible. Recent State actions endorsing LRN and setting implementation timetables also demonstrate that it is technically feasible. The Release to Pivot and Query on Release technologies proposed by Pacific Bell, however, do not meet the statutory definition of number portability and may not be approved by the Commission.

The Commission also must adopt a competitively neutral cost recovery mechanism. The most competitively neutral mechanism is to require each carrier to bear its own costs of implementation. Cost recovery mechanisms that shift costs from incumbent carriers to new entrants are inherently non-neutral and, in any event, there is no reason to believe that incumbents will incur disproportionately high costs to implement portability. The Commission also should reject GTE's proposal for pooling costs because it will create incentives for incumbents to exaggerate their costs of implementing portability.

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# REPLY COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its reply comments in response to the Commission's Public Notice regarding the above-referenced proceeding.[1/] The filings in response to the Public Notice reflected a consensus that the passage of the 1996 Act confirmed and extended the Commission's authority to require number portability. As shown below, however, certain parties took positions that are inconsistent with the requirements of the 1996 Act.

Cox files these reply comments to address two issues. First, the Commission must heed the statutory mandate to require implementation of number portability now, contrary to suggestions from some parties that the Commission should wait for an indefinite period. Second, both the statute and sound policy demand that the Commission adopt cost recovery mechanisms that require each carrier to bear its own costs of implementing number portability.

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1/ "Further Comments, Telephone Number Portability," Public Notice, DA 96-358, rel. Mar. 14, 1996 (the "Public Notice"). The Public Notice sought additional comments on how the passage of the Telecommunications Act of 1996 (the "1996 Act") affects the issues raised in the Notice of Proposed Rulemaking in this proceeding. *Telephone Number Portability,* Notice of Proposed Rulemaking, 10 FCC Rcd 12350 (1995).

## I. The Commission Has a Responsibility Under the 1996 Act to Mandate Implementation of True Number Portability Now.

The 1996 Act imposes an obligation on all local exchange carriers to provide true service provider local telephone number portability "to the extent technically feasible." 47 U.S.C. § 251(c)(2). While some commenters suggest there should be further delay in requiring implementation of number portability, the Commission should heed the statutory mandate for implementation of portability now.

First, there is no ambiguity in the 1996 Act. A local exchange carrier's obligation to provide portability is dependent only on whether number portability is "technically feasible." *Id.* The meaning of that term is well understood. As the Supreme Court has explained, the plain meaning of "feasible" is "capable of being done," and this plain meaning analysis begins and ends the inquiry. *See American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 509-10 (1981) (*"Donovan"*). Indeed, as Time Warner points out, the use of the word "feasible" leaves the Commission with "little administrative discretion."[2/] A requirement for technical feasibility does not, as GTE and USTA suggest, permit consideration of other issues. *See* Supplemental Comments of GTE at 4-5; Supplemental Comments of United States Telephone Association ("USTA") at 4. So long as there is a technology that meets the statutory definition of number portability, the Commission does not have the discretion to consider any other factors.[3/]

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2/ Supplemental Comments of Time Warner Communications Holdings, Inc. at 3, *citing Donovan,* 452 U.S. at 509.

3/ Most notably, the Commission is not empowered to consider costs in determining whether to require number portability. *Compare Donovan,* 452 U.S. at 510 ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute") *with Reynolds Metals Co. v. EPA,* 760 F.2d 549, 565

(continued...)

Under this standard, there is no doubt that number portability is technically feasible. AT&T's Location Routing Number ("LRN") proposal has been found to be feasible and to meet the basic definition of number portability by several States that have conducted independent inquiries. *See* Supplemental Comments of Cox at 8. While GTE purports to identify a series of issues that must be resolved before LRN is deemed technically feasible, they are red herrings. Supplemental Comments of GTE at 4-7. Implementation of any new technology has impacts on operations systems, provisioning, billing and the other areas GTE identifies. Even introduction of a new area code requires changes in these systems. As a consequence, incumbent carriers constantly make changes in these systems, and will continue doing so regardless of whether number portability is implemented. Thus, although the specific changes necessary to implement portability may not have been identified, there can be no question that the modifications to supporting systems necessary for number portability are technically feasible.[4/] If there were any doubt, the implementation schedules for LRN that have been adopted by several States are significant evidence that LRN is, indeed, technically feasible. *See* Supplemental Comments of Ameritech at 5 (Commission should adopt the LRN architecture already adopted in several states).

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3/ (...continued)
(4th Cir. 1985) (Congressional specification of different cost standards applicable to different pollution control regimes). Congress specifically demonstrated that it knows how to indicate that cost-benefit analysis is permitted in the 1996 Act when it adopted provisions allowing States to engage in such an analysis in determining whether to exempt rural telephone companies from Section 251(c) requirements. *See* 47 U.S.C. § 251(f). Consequently, the omission of a cost-benefit requirement from Section 251(c)(2) means that Congress concluded that no such analysis should be permitted in this proceeding.

4/ By way of introducing this argument, GTE suggests that "'technically feasible' should not be confused with 'technically possible.'" As described above, the Supreme Court already has determined that "technically feasible" and "technically possible" are in fact, the same thing. *See Donovan,* 452 U.S. at 509.

While LRN meets the statutory standards, technologies suggested by some commenters do not. Under the 1996 Act, number portability is defined as technology permitting customers to change carriers and keep their telephone numbers "without impairment of quality, reliability, or convenience." 47 U.S.C. § 153(30). The requirement that service not be impaired disqualifies Pacific Bell's Release to Pivot (which Pacific appears to have abandoned) and Query on Release proposals for number portability. The key flaw in both of these proposals is that calls to ported numbers would necessarily require more processing than calls to non-ported numbers, introducing additional opportunities for delay and failure to complete the call. *See* Supplemental Comments of MCI, Attachments A, B. This directly violates the specific statutory requirement that customers with ported numbers suffer no impairment to their service. Consequently, neither Release to Pivot nor Query on Release can be adopted as a number portability mechanism.[5/]

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5/ USTA attempts to induce additional delay in the process of implementing portability by suggesting that the LEC obligation to provide portability should not be triggered "until customers . . . have the ability to switch carriers." Supplemental Comments of USTA at 5. This approach is not supported by the statute, which imposes an unconditional obligation. Delaying the start of implementation until a competitor actually is operating also would be contrary to the Congressional intent to jump start competition. Moreover, it is apparent that there will be competition in every major metropolitan area in the near future, as AT&T, MCI, Cox and others have filed applications for authority to compete with incumbent LECs across the country. In light of these considerations, the implementation schedule proposed by the Ad Hoc Coalition of Competitive Carriers in the first round of this proceeding, which would require implementation in the top 100 MSAs over a two year period and would permit States to adopt faster implementation timelines, is much more reasonable than USTA's go-slow approach. *See* Comments of Ad Hoc Coalition of Competitive Carriers at 15-17; Supplemental Comments of Cox at 9.

## II. The Cost Recovery Mechanism for Number Portability Must Not Unreasonably Burden New Entrants.

The supplemental comments revealed that incumbent LECs still are unwilling to bear their share of the costs of implementing number portability. The Commission should resist the efforts of incumbent LECs to shift costs to new competitors. Instead, it should adopt a cost recovery model that requires each carrier to bear its own costs of implementing number portability. Unlike the incumbents' proposals, this approach is consistent with the statutory requirement that cost recovery be competitively neutral. *See* 47 U.S.C. § 251(e)(2).

As described in Cox's supplemental comments, requiring carriers to bear their own costs of implementing number portability is the most competitively neutral mechanism for recovering those costs. *See* Supplemental Comments of Cox at 4-5. Some incumbent LECs believe, however, that their costs should be shifted onto new entrants in the name of "equity." Pacific Bell, for instance, argues that the Commission should not impose financial burdens on incumbents, and GTE says a pooling mechanism should be adopted to share all costs. Supplemental Comments of Pacific at 7; Supplemental Comments of GTE at 4.

Pacific's argument is based on the theory that number portability will be a greater burden for incumbents than new entrants. There is no reason to believe this is true.[6/] New entrants, just like incumbents, will have to purchase the software and hardware necessary to implement number portability. The only difference is that the costs of new entrants will be bundled into their other costs of beginning to offer service, while incumbents will be incurring costs to upgrade their existing facilities. In practice, a new entrant's cost per

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6/ There also is little reason to believe Pacific Bell's cost estimates for LRN, which are significantly higher than those computed by AT&T, given that Pacific Bell is proposing a competing approach to providing number portability.

customer is likely to be higher than an incumbent's because the software and much of the hardware necessary to implement number portability will cost the same amount regardless of how many customers are being served. In addition, incumbents will be able to take advantage of unused capacity on some of their facilities, which will reduce their costs, while new entrants will have to build their facilities from scratch.

GTE proposes a pooling of costs and a uniform number portability surcharge on each customer's telephone bill. Supplemental Comments of GTE at 4 n. 9. The Commission should reject pooling both because it is not competitively neutral and because it will create incentives for incumbents to inflate the costs of providing number portability.

Pooling is not competitively neutral because it will shift costs from one group of carriers (incumbents) to another group of carriers (new entrants). Any cost shifting is inherently not neutral because it reflects a judgment that some carriers' costs of providing a service should be subsidized. In addition, shifting costs from incumbents to new entrants would create a new barrier to entering the local exchange market, contrary to Congressional intent.[7/]

Adopting a pooling mechanism also would create inappropriate incentives for carriers implementing portability. If all costs of portability are shared, then there is no incentive to minimize costs and there is a significant incentive to try to add costs to the pool that would have been incurred whether or not the carrier was implementing portability. Indeed, there

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7/ *See, e.g.*, 47 U.S.C. §§ 251(d)(3) (permitting preemption of requirements that are contrary to the "purposes" of the competition provisions of the 1996 Act), 253 (preempting entry barriers). In addition, mechanisms that shift the costs of implementation of number portability to new entrants inevitably would give a competitive advantage to new entrants who waited to enter the market until number portability is established, because only those new entrants in the market at the time that portability is implemented would have to pay a portion of the costs incurred by incumbents.

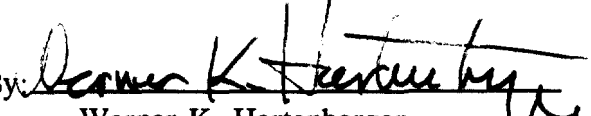
already is evidence in this proceeding that carriers are including unreasonable costs in their estimates. *See, e.g.*, Supplemental Comments of Pacific Bell at 7 (estimating total costs of $1 billion to implement portability). It is likely that costs would balloon even further if the Commission adopted a pooling mechanism.[8/] Consequently, the Commission should reject the proposals of incumbent LECs to shift or share the costs of implementing number portability and should require all carriers to bear their own costs.

## III. Conclusion

For all of these reasons, Cox Enterprises, Inc. urges the Commission to adopt regulations requiring the implementation of true service provider local telephone number portability, in accordance with Cox's comments in this proceeding.

Respectfully submitted,

COX ENTERPRISES, INC.

By: 

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8/ A pooling mechanism also would be administratively complex. On the other hand, there will be no need for any administrative provisions if carriers bear their own costs of implementing number portability.

## CERTIFICATE OF SERVICE

I, J.G. Harrington, of the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 5th day of April, 1996, I caused copies of the foregoing "Reply Comments" to be served via first-class mail, postage prepaid (except where indicated as via hand-delivery), to the following:

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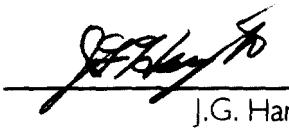

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